

WC 07-138

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

SPRINT SPECTRUM, L.P.)

Petition for Declaratory Ruling)

WC Docket No. _____

FILED/ACCEPTED

JUL - 9 2007

Federal Communications Commission
Office of the Secretary

To: Wireline Competition Bureau,
Telecommunications Access Policy Division

~~RECEIVED - FCC~~

~~JUN - 8 2007~~

~~Federal Communications Commission
Bureau / Office~~

PETITION FOR DECLARATORY RULING

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June 8, 2007

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Pursuant to Section 554(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, Sprint Spectrum, L.P. ("Sprint") hereby requests that the Commission issue a declaratory ruling that the rule set forth in the Kansas Corporation Commission's ("KCC") October 2, 2006 Order in Docket No. 06-GIMT-446-GIT requiring an eligible telecommunications carrier ("ETC") to apply federal Lifeline support to reduce the cost of any rate plan offered by an ETC (hereafter, the "Kansas Lifeline Rule"), as opposed to the carrier's lowest cost generally available rate plan, violates federal law.¹

Specifically, Sprint requests that the Commission declare that the Kansas Lifeline Rule violates 47 C.F.R. § 54.403(b) and 47 U.S.C. § 254(f) because it is inconsistent with the Commission's determination that federal Lifeline support "shall" be applied to reduce

¹ Sprint provides commercial mobile radio services (CMRS) in the state of Kansas and has been designated as a federal competitive ETC for a service area including much of the eastern one-half of the state. *See Application of Sprint Spectrum L.P. (d/b/a Sprint PCS) for Designation as an Eligible Telecommunication Carrier for Purposes of Receiving Federal and State Universal Service Support*, Docket No. 99-SSLC-173-ETC, Order #6 (rel. Jan. 18, 2000); *see also Application of Sprint Spectrum L.P. (d/b/a Sprint PCS) for Designation as an Eligible Telecommunications Carrier for Purposes of Receiving Federal and State Universal Service Support*, Docket No. 99-SSLC-173-ETC, Order #10 (rel. May 19, 2000).

the cost of an ETC's lowest-cost generally available residential rate. In addition, as applied to a Commercial Mobile Radio Service ("CMRS") provider, the Commission should further declare that the Kansas Lifeline Rule violates 47 U.S.C. § 332(c)(3)(A), because it requires a wireless competitive ETC to offer a reduced rate service without the ability to lawfully recover the subsidy from the federal universal service fund.²

I. BACKGROUND

In October 2005, the KCC commenced an administrative rulemaking proceeding (Docket No. 06-GIMT-446-GIT) to review the adoption of certain additional regulations and requirements applicable to carriers designated as federal ETCs in Kansas. On October 2, 2006, the KCC released an Order in the proceeding adopting the following requirement:

ETCs are required to allow Lifeline customers to choose a calling plan and to apply the Lifeline discount to the plan selected by the customer. Any ETC that does not allow customer selection at this time must do so within 180 days [*i.e.*, by March 31, 2007] of the date of this Order.³

In other words, the KCC directed all ETCs to apply the federal Lifeline discounts to any rate plan selected by the consumer, rather than an ETC's lowest-cost residential rate as required by 47 C.F.R. § 54.403(b). Sprint sought reconsideration of the KCC's

² 47 U.S.C. § 332(c)(3)(A) ("[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services . . ."). CMRS providers, like Sprint, are further exempt from the KCC's rate regulation under Kansas law. See K.S.A. §§ 66-104a(c) and 66-1,143(b).

³ See Order Adopting Requirements for Designation of Eligible Telecommunications Carriers, Docket No. 06-GIMT-446-GIT, ¶¶ 66, 77 (rel. Oct. 2, 2006) ("Order") (Attachment 1).

Order.⁴ The KCC denied Sprint's petition for reconsideration of the Kansas Lifeline Rule.⁵

On March 23, 2007, Sprint filed a Complaint with the United States District Court for the District of Kansas (the "Court") challenging the Kansas Lifeline Rule and seeking injunctive relief.⁶ On May 8, 2007, the Court, by agreement of the parties, referred the matter to the Commission under the primary jurisdiction doctrine.⁷ All matters in the case have been stayed pending a decision by the Commission.

II. OVERVIEW OF UNIVERSAL SERVICE SUPPORT FOR LOW-INCOME CONSUMERS

The Telecommunications Act of 1996, which amended the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (collectively, "the Act"), established a federal program to ensure that affordable telecommunications services are available to all Americans.⁸ This policy objective is referred to as "universal service."

Congress determined that universal service goals would be accomplished through competition, and directed the Commission to create a federal universal service funding mechanism that would provide financial support to both incumbent and competitive telecommunications carriers that satisfy basic criteria established by the Commission. Carriers that qualify for such support are referred to as federal "eligible

⁴ See Sprint Petition for Reconsideration of the Order, Docket No. 06-GIMT-446-GIT (Attachment 2). Alltel Kansas Limited Partnership also sought reconsideration of the specific requirement to allow Lifeline customers to choose any rate plan offered by an ETC (Attachment 3).

⁵ See Order Addressing Petitions for Reconsideration; Docket No. 06-GIMT-446-GIT (rel. Nov. 20, 2006), ¶¶ 41-47, 58. (Attachment 4).

⁶ *Sprint Spectrum, L.P. v. Moline et al.*, Complaint for Declaratory and Injunctive Relief, Case No. 2:07-cv-2130 (Mar. 23, 2007) (Attachment 5). See also *Sprint Spectrum, L.P. v. Moline et al.*, Sprint Spectrum, L.P.'s Motion for a Temporary Restraining Order and/or Preliminary Injunction, Case No. 2:07-cv-2130 (Mar. 23, 2007) (Attachment 6); *Sprint Spectrum, L.P. v. Moline et al.*, Memorandum of Law in Support of Its Motion for a Temporary Restraining Order and/or Preliminary Injunction, Case No. 2:07-cv-2130 (Mar. 23, 2007) (Attachment 7).

⁷ *Sprint Spectrum, L.P. v. Moline et al.*, Case No. 2:07-cv-2130 (May 8, 2007) (Attachment 8).

⁸ 47 U.S.C. §§ 214 and 254.

telecommunications carriers” or “ETCs.” To further Congress’ policy objective, the Commission has established federal universal service mechanisms that provide public assistance to qualified, low-income consumers. These universal service mechanisms are known as the federal “Lifeline” and “Link Up” programs.⁹

A. Lifeline

The federal Lifeline program reimburses an ETC for providing qualified, low-income consumers a monthly discount off the cost of the carrier’s lowest-cost residential rate. As set forth in the Commission’s universal service rules, Lifeline is defined as “a retail local service offering: (1) [t]hat is available only to qualifying low-income consumers;¹⁰ and (2) [f]or which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in [47 C.F.R. §] 54.403.”¹¹

Section 54.403 of the Commission’s Rules defines both the amount of federal Lifeline support available to a qualified, low income consumer and the limitation on the application of such support to an ETC’s lowest cost residential rate. Pursuant to 47 C.F.R. § 54.403(a), federal Lifeline support is comprised of four assistance credits or “Tiers.” “Tier One” support is equal to the monthly “tariffed rate in effect for the

⁹ The Commission’s regulations covering the Lifeline and Link Up programs are codified at 47 C.F.R. §§ 54.400-54.417.

¹⁰ In Kansas, a consumer will be deemed eligible to receive federal Lifeline and/or Link Up assistance if the applicant’s total household income is at or below 150% of the federal poverty guidelines or the applicant participates in any of the following public assistance programs: Medicaid, Food Stamps, Supplemental Security Income (SSI), General Assistance, Temporary Assistance for Needy Families (TANF) or the National School Free Lunch program. *See* 47 C.F.R. § 54.409(a). *See also Wireline Competition Bureau Answers Frequently Asked Questions Concerning Lifeline*, Public Notice, CC Docket No. 96-45, DA 05-1406 (rel. May 18, 2005); *In the Matter of Lifeline and Link-Up*, 19 FCC Rcd. 8302, CC Docket 96-45 (2004). A resident of federally-recognized Tribal lands will be eligible for enhanced Lifeline and/or Link Up assistance if the applicant satisfies any of the foregoing criteria or participates in any of the following additional programs: Bureau of Indian Affairs General Assistance, tribally-administered TANF or Head Start (based on income qualifying standards). *See* 47 C.F.R. § 54.409(b) (emphasis added).

¹¹ 47 C.F.R. § 54.401(a) (emphasis added).

primary residential End User Common Line charge¹² of the incumbent local exchange carrier serving the area in which the qualifying low-income consumer receives service.” “Tier Two” support is equal to \$1.75 per month. “Tier Three” support is equal to “one-half the amount of any state-mandated Lifeline support of Lifeline support otherwise provided by the carrier, up to a maximum of \$1.75 per month.” If applicable, “Tier Four” provides up to an additional \$25 per month for an eligible resident of Tribal lands, provided the additional support does not bring the basic local residential rate below \$1 per month.

Application of the foregoing federal Lifeline support credits to a qualifying customer’s basic residential rate is governed by 47 C.F.R. § 54.403(b), which provides in pertinent part:

Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges shall apply Tier-One federal Lifeline support to waive the federal End-User Common Line charges for Lifeline consumers. Such carriers shall apply any additional federal support amount to a qualifying low-income consumer’s intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount, to reduce their lowest tariffed (or otherwise generally available) residential rate for the services enumerated in Section 54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount.¹³

In adopting the regulations discussed above, the Commission clarified that a federal ETC must apply the federal Lifeline support it receives to the carrier’s lowest generally available rate for the Supported Services:

¹² The “End User Common Line” charge is also referred to as the “Subscriber Line Charge” or “SLC.”

¹³ CMRS providers, like Sprint, do not provide service pursuant to utility tariffs, but rather enter into individual service contracts with subscribers. See 47 C.F.R. § 20.15(c). Accordingly, CMRS providers are obligated under Section 54.403(b) of the Commission’s Rules to apply the Lifeline discount to their lowest “generally available” residential rate.

These rules require that carriers offer qualified low-income consumers the services that must be included within Lifeline service, as discussed more fully below, including toll-limitation service. ILECs providing Lifeline service will be required to waive Lifeline customers' federal SLCs and, conditioned on state approval, to pass through to Lifeline consumers an additional \$1.75 in federal support. ILECs will then receive a corresponding amount of support from the new support mechanisms. Other eligible telecommunications carriers will receive, for each qualifying low income consumer served, support equal to the federal SLC cap for primary residential and single-line business connections, plus \$1.75 in additional federal support conditioned on state approval. The federal support amount must be passed through to the consumer in its entirety. In addition, all carriers providing Lifeline service will be reimbursed from the new universal service support mechanisms for their incremental cost of providing toll-limitation services to Lifeline customers who elect to receive them. The remaining services included in Lifeline [i.e., the supported services other than toll-limitation service] must be provided to qualifying low-income consumers at the carrier's lowest tariffed (or otherwise generally available) rate for those services, or at the state's mandated Lifeline rate, if the state mandates such a rate for low-income consumers.¹⁴

Commission Rule 54.403(b) is unambiguous. The Commission clearly stated its intention to only apply the Lifeline discount to an ETC's lowest cost residential rate. Indeed, in so doing, the Commission relied on the Joint Board's recommendation that the "Lifeline rate" must be "the carrier's lowest comparable non-Lifeline rate reduced by at least the \$5.25 [now \$8.25] amount of federal support."¹⁵ Commission Rule 54.403(b) also speaks in terms of applying the Lifeline support amount to the "lowest tariffed (or

¹⁴ See *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, 8971, CC Docket No. 96-45, FCC 97-157, ¶ 368 (rel. May 8, 1997) (emphasis and brackets added). As originally promulgated, Commission Rule 54.403(b) provides, as it still does today, that federal Lifeline must be applied only to reduce the cost of an ETC's lowest cost generally available residential rate: "Eligible carriers that charge federal End-User Common Line charges or equivalent federal charges shall apply the federal baseline Lifeline support to waive Lifeline consumers' federal End-User Common Line charges. Such carriers shall apply any additional federal support amount to a qualifying low-income consumer's intrastate rate, if the state has approved of such additional support. Other carriers shall apply the federal baseline Lifeline support amount, plus the additional support amount, where applicable, to reduce their lowest tariffed (or otherwise generally available) residential rate for the services enumerated in § 54.101(a)(1)-(9) of this part, and charge Lifeline consumers the resulting amount." (*"Universal Service Order"*) (Emphasis added).

¹⁵ See *In the Matter of Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd. 87, 303, CC Docket No. 96-45, FCC 96J-3 (1996).

otherwise generally available) residential rate” – not multiple residential rates. Accordingly, all federal ETCs must apply the federal Lifeline support discounts to reduce the cost of the carrier’s single lowest residential rate, not the cost of any residential rate plan the carrier offers.

B. Link Up

The federal Link Up program reimburses ETCs for providing discounted service activation or installation charges to qualified, low-income consumers. Consumers qualifying for Link Up assistance are eligible to save up to 50% of the first \$60 of the ETC’s customary service activation or installation charges (*i.e.*, the subscriber will receive a 50% discount or \$30.00, whichever is less). Qualified, low-income consumers residing on federally-recognized Tribal lands may receive an additional \$70.00 to defray 100% of the service activation or installation charges between \$60.00 and \$130.00. Eligible consumers may also establish an interest-free 12-month deferred payment plan for the remaining activation or installation charges of up to \$200.00. Federal Link Up assistance may only be applied once to initiate service at the same principal residence, and Link Up assistance cannot be applied to customer facilities or equipment, including the cost of the customer’s phone.

C. Sprint’s Lifeline Service Offering in Kansas

In Kansas, Sprint’s Lifeline service offering is based on the Company’s lowest-cost \$29.99 base rate plan (called the Sprint Basic Plan), which includes 200 Anytime Minutes and unlimited Night and Weekend Minutes. The calling area for Sprint’s Lifeline service offering is national, so Lifeline customers may make outgoing long distance calls without incurring an additional charge. After applying the total \$13.50 federal Lifeline discount, Sprint customers pay only \$16.49 per month for Lifeline

service.¹⁶ Sprint also provides Link Up assistance to qualifying customers in accordance with the Commission's rules.

Conceivably, under the Kansas Lifeline Rule, an eligible Lifeline subscriber could choose to sign up for Sprint's \$149.99 monthly rate plan which comes with 4000 "Anytime Minutes" (as opposed to the Sprint Basic Plan) and receive a \$13.50 discount off the \$149.00 monthly rate, resulting in a Monthly Recurring Charge ("MRC") of \$136.49. For a Lifeline consumer whose total household income is at or below 150% of the federal poverty guidelines – a status that qualifies someone for Lifeline assistance in Kansas – a \$136.99 monthly bill would account for more than 13% of the Lifeline consumer's net monthly household income.¹⁷ Of course, Sprint also offers rate plans with higher monthly rates. Surely, in adopting its Lifeline rules, the Commission did not intend for qualifying low-income consumers to subscribe to a carrier's premium plans. Rather, the Commission's goal was simply to ensure that low-income subscribers "maintained access to telecommunications services."¹⁸ It was this same goal that led the Commission to follow the Joint Board's Recommended Decision in requiring ETCs to offer voluntary toll-limitation without charge to low-income consumers.¹⁹

¹⁶ To enable Lifeline customers in Kansas to receive the full \$13.50 discount, Sprint voluntarily reduces its Sprint Basic Plan rate by \$3.50. These "carrier-matching funds" ensure that the Lifeline subscriber will receive \$1.75 in federal Tier 3 matching support. See 47 C.F.R. § 54.409(c) ("[Q]ualifying low-income consumers shall also qualify for Tier-Three Lifeline support, if the carrier offering the Lifeline service is not subject to the regulation of the state and provides carrier-matching funds. . .").

¹⁷ Based upon a 15% federal tax rate and a 3.5% state tax rate, 150% of the 2007 Federal Poverty Guidelines for an individual is \$12,481.73 per year or \$1,040.14 per month. In contrast, the \$29.99 rate less the \$13.50 discount would result in a \$16.49 MRC, or 1.62% of the consumer's net monthly income.

¹⁸ See *Universal Service Order*, ¶ 397.

¹⁹ See *Id.*, ¶¶ 28 & 385 ("[W]e agree with the Joint Board that Lifeline service should include toll-limitation services, at the customer's request, to the extent that carriers are capable of providing them. We agree with the Joint Board that toll-limitation services will help low-income consumers control their toll bills and consequently be better able to maintain access to telecommunications services, as section 254(b)(3) envisions. . . . As the Joint Board observed, studies demonstrate that a primary reason subscribers lose access to telecommunications services is failure to pay long distance bills . . . [therefore] we find that toll-limitation services are "essential to education, public health or public safety" and "consistent with the

III. STATE ADMINISTRATION OF THE FEDERAL UNIVERSAL SERVICE PROGRAMS IS SUBJECT TO COMMISSION OVERSIGHT

A. The Kansas Lifeline Rule Violates 47 U.S.C. § 254(f)

Section 214(e) of the Act provides that a State commission – here the KCC – has the authority and responsibility to designate carriers as eligible to receive federal universal service support. Pursuant to this delegated authority, the KCC, in 2000, designated Sprint as a competitive federal ETC for a defined geographic “service area” within the State of Kansas.²⁰ Section 254(f) of the Act further provides that a State may adopt additional regulations governing the provision of universal service within its jurisdiction, provided: (1) any additional regulations are not inconsistent with the Commission’s universal service rules; and (2) the State adopts a separate funding mechanism to support compliance with the additional requirements. Section 254(f) provides in pertinent part:

A State may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service. [. . .] A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.²¹

Thus, while the KCC may have some discretion to adopt additional Lifeline requirements, it cannot implement a rule that is inconsistent with Commission Rule

public interest, convenience, and necessity” for low-income consumers in that they maximize the opportunity of those consumers to remain connected to the telecommunications network.”) (internal footnotes omitted). .”).

²⁰ For purposes of universal service requirements, an ETC’s designated “service area” is defined as the “geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms.” A service area defines the overall area for which the carrier shall receive support from federal universal support mechanisms.” See 47 C.F.R. § 54.207(a) (emphasis added). Sprint’s designated service area covers only a portion of the State and is smaller than the Company’s licensed service area in Kansas.

²¹ 47 U.S.C. § 254(f) (emphasis added).

54.403(b) and its requirement that federal Lifeline support be applied only to reduce the cost of an ETC's lowest-cost residential rate.

B. The Kansas Lifeline Rule Violates 47 U.S.C. § 332(c)(3)(A)

A State's adoption of additional universal service regulations may be further restrained by certain jurisdictional limitations. Specifically relevant to this case are the jurisdictional limitations set forth in Section 332(c)(3)(A) of the Act, which expressly prohibits State regulation of CMRS carrier rates and entry as follows:

Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services²²

Although a State may petition the Commission, pursuant to 47 C.F.R. § 20.13, for an exemption from Section 332(c)(3)(A), the KCC has not done so. Without such an exemption, the KCC's actions violate federal law because compliance with the Kansas Lifeline Rule requires a CMRS provider designated as a federal ETC to provide an equivalent monthly service discount to qualified, low-income consumers that is not lawfully reimbursable through federal universal service support, thereby amounting to rate regulation.²³

More specifically, because 47 C.F.R. § 54.403(b) prohibits an ETC from applying federal Lifeline assistance to reduce the cost of any rate plan other than the carrier's lowest cost generally available residential rate plan, the ETC could not properly seek reimbursement from the federal universal service fund for discounts required to be

²² 47 U.S.C. § 332(c)(3)(A) (emphasis added).

²³ See *WWC Holding Co. v. Sopkin*, 420 F.Supp.2d 1186, 1193-94 (D. Colo. 2006), *rev'd on other grounds*, 2007 U.S. App. LEXIS 12942 (10th Cir. 2007) (A CMRS provider's status as a federal ETC did not authorize the State regulatory commission to regulate the carrier's rates in violation of 332(c)(3)(A). The State commission must first petition the Commission for regulatory authority under 47 U.S.C. § 332(c)(3)(A) and 47 C.F.R. § 20.13)).

applied to premium rate plans under the Kansas Lifeline Rule. Therefore, carriers are forced to charge a different price to Lifeline customers than they charge to their customer base at-large. This KCC requirement to charge a certain price for Sprint's services -- without the ability to seek a USF payment for the difference in the Lifeline rate and the regular rate -- is a direct regulation of Sprint's rates.²⁴ The KCC's unfunded mandate, therefore, constitutes State rate regulation preempted by Section 332(c)(3)(A) of the Act.


IV. CONCLUSION

The Kansas Lifeline Rule violates federal law for the following three reasons: (1) compliance with the Kansas Lifeline Rule would require a federal ETC to inappropriately apply federal Lifeline support to reduce the cost of any rate plan selected by the consumer, rather than the carrier's lowest cost residential rate plan, as required by 47 C.F.R. § 54.403(b); (2) it is inconsistent and cannot be reconciled with the Commission's universal service rules in violation of 47 U.S.C. § 254(f); and (3) compliance with the Kansas Lifeline Rule would require a CMRS provider designated as a federal ETC to provide an equivalent monthly service discount to qualified, low-income consumers that will not be reimbursed by federal universal service support. As a result, the rule would impermissibly regulate a CMRS carrier's rates in violation of 47 U.S.C. § 332(c)(3)(A).

²⁴ It may be argued that USAC has reimbursed other carriers for Lifeline discounts applied to calling plans other than the lowest generally available residential rate, and thus, carriers like Sprint are not prohibited from obtaining reimbursement. However, to Sprint's knowledge, USAC has not audited whether carriers have applied for reimbursement for discounts given only to their lowest generally available residential rate. It is Sprint's position that proper application of 47 C.F.R. § 54.403(b) by USAC would lead to a denial of reimbursement and consequentially rate regulation since, under the KCC's Order, Sprint would be forced to give Lifeline discounts on rate plans for which it cannot be reimbursed.

For these reasons, the Commission should declare the Kansas Lifeline Rule preempted by federal law.

Respectfully submitted,

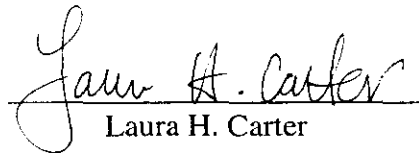


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June 8, 2007

DECLARATION

I, Laura H. Carter, Vice President, Government Affairs - Federal Regulatory, of Sprint Nextel Corp., hereby declare, under penalty of perjury, that I have reviewed and am familiar with this Petition for Declaratory Ruling, to which this Declaration is attached and that, to the best of my knowledge, information and belief, all statements of fact set forth in the Petition are true and correct.


Laura H. Carter

June 8, 2007

CERTIFICATE OF SERVICE

I, Todd B. Lantor, hereby certify that on this 8th day of June 2007, a true and correct copy of the foregoing Petition for Declaratory Ruling was sent via hand delivery, or overnight mail (indicated by *), overnight mail to the following:

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ATTACHMENT 1

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Brian J. Moline, Chair
 Robert E. Krehbiel
 Michael C. Moffet

In the Matter of a General Investigation)
Addressing Requirements for Designation) Docket No. 06-GIMT-446-GIT
of Eligible Telecommunications Carriers.)

**ORDER ADOPTING REQUIREMENTS
FOR DESIGNATION OF ELIGIBLE TELECOMMUNICATIONS CARRIERS**

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for a decision. Being duly advised in the premises and familiar with its files and records, the Commission finds and concludes as follows:

1. The Commission opened this docket to review its requirements for designating eligible telecommunications carriers (ETCs) pursuant to the authority delegated to state commissions by 47 U.S.C. § 214(e)(2) which provides that state commissions must find the requesting carrier meets the requirements of 47 U.S.C. § 214(e)(1). Those requirements are to:

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) [47 USCS § 254(c)], either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefore using media of general distribution.

Before designating an additional ETC in a service area served by both rural and non-rural telephone companies, the state commission must determine that the designation is in the

public interest.¹ 47 U.S.C. § 214(e)(6) provides that the Federal Communications Commission (FCC) shall, when requested, designate an ETC that meets the 214(e) criteria, when that carrier is not subject to state commission jurisdiction. Pursuant to the 214(e) delegation, this Commission has designated several competitive ETCs.

2. In the October 26, 2005 Order opening this docket (*Order Opening Docket*), the Commission explained that it wanted the parties to address the requirements adopted by the FCC in *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, released March 17, 2005, FCC 05-26, (*FCC Order*). In that Order, the FCC encouraged state commissions to adopt the same requirements.² The *Order Opening Docket* also requested comment on certain generic issues the Commission had deferred from the dockets designating ALLTEL Kansas Limited Partnership (ALLTEL), Docket No. 04-ALKT-283-ETC, Order issued September 24, 2004, and RCC Minnesota, Inc. (RCC), Docket No. 04-RCCT-338-ETC, Order issued September 30, 2004, as ETCs.

3. The following parties entered appearances in this docket: Sprint Nextel Corporation (Sprint), Citizens' Utility Ratepayer Board (CURB), Staff, Cingular Wireless PCS LLC (Cingular), Southwestern Bell Telephone, L.P. (SWBT), State Independent Alliance (SIA), Independent Telecommunications Group, Columbus et al. (ITG), RCC, U.S. Cellular Corporation (USCOC), ALLTEL, and Nex-Tech, Inc. and Nex-Tech Wireless, Inc. (collectively, Nex-Tech).

¹ The FCC determined that designation of ETCs in non-rural areas also requires a public interest determination. *In the Matter of Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia*, CC Docket No. 96-45. *Memorandum Opinion and Order*. Rcl. January 22, 2004, ¶ 27.

² *FCC Order*, ¶ 1.

4. Initial Comments were filed by Sprint, SWBT, CURB, Cingular, ALLTEL SIA and ITG, RCC and USCOC, and Staff. Reply Comments were filed by Sprint, CURB, Staff, SWBT, RCC and USCOC, ALLTEL and Nex-Tech. Staff prepared a Report and Recommendation (Report) summarizing positions on the issues. The parties' Comments and Staff's Report provide the basis for this Order. The Report is served with the Order. The Order will refer to Comments and the Report that lead the Commission to its conclusions. The Commission refers the parties to the Report for a more in-depth analysis of the Initial Comments and Reply Comments.

5. The Commission has jurisdiction to adopt requirements for designation of ETCs pursuant to K.S.A. 66-1,188, K.S.A. 66-2008(b) and 47 U.S.C. § 214(e).

Minimum Local Usage

6. The FCC did not establish a minimum local usage requirement, but recommended state commissions consider minimum local usage in their designation determinations. The FCC stated it would look at the following factors on an individual case basis each time it was called on to make an ETC designation:

- the size of the local calling scope compared to that of the incumbent;
- calling plans that include some free minutes, and;
- whether carriers offer unlimited free minutes to government, social service, health facilities, educational institutions and emergency numbers.

The Commission requested comments on the factors recommended by the FCC and whether additional factors should be considered.³

7. CURB recommended the Commission require ETCs to provide a minimum number of local usage minutes equal to the incumbent local exchange carriers' (ILECs) average local usage minutes and recommended against a case-by-case

³ Order Opening Docket, ¶ 6.

evaluation.⁴ SIA and ITG recommended the Commission compare an ETC applicant's local usage minutes against actual ILEC local usage data or 1,000 minutes per month. They also recommended that ETCs that do not provide unlimited local usage be required to disclose the cost of exceeding the local usage included in the customer's plan.⁵ ALLTEL, RCC and USCOC and Sprint argued the Commission should not impose a minimum usage requirement.⁶ RCC and USCOC also observed that state commissions are precluded from regulating rates of commercial mobile radio service (CMRS) providers and that adoption of a local usage requirement inevitably is tied to regulation of rates.⁷ Staff initially recommended the Commission consider calculating the ILECs' average local usage, but after reviewing the Comments of the parties, Staff concluded in its Reply Comments that the Commission might not want to adopt that recommendation since the Commission cannot control the pricing of the plans offered to consumers.⁸ Staff suggested the Commission instead consider the comparability of a competitive ETC's offering on a case by case basis "by evaluating the total service package, including the local calling scope, included features, and usage that might otherwise be considered long distance."⁹ Staff suggested the Commission also consider whether an ETC applicant offers unlimited calling to government, social service, health facilities, educational institutions and emergency numbers when considering comparability.¹⁰

8. The Commission finds Staff's recommendation reasonable. It would undoubtedly be more clear-cut to adopt a minimum usage requirement and measure all

⁴ CURB Comments, ¶ 5, CURB Reply Comments, ¶¶ 9-11.

⁵ SIA and ITG Comments, ¶¶ 6-7.

⁶ ALLTEL Comments, ¶¶ 7-11, RCC and USCOC Reply Comments, ¶¶ 8-9, Sprint Comments, p. 4.

⁷ RCC and USCOC Comments, ¶ 18.

⁸ Staff Reply Comments, ¶ 7.

⁹ Report, p. 5.

¹⁰ Id.

ETC usage plans against that requirement, but the fact that the Commission does not set prices for competitive ETCs makes such a requirement meaningless. It would seem that the Commission could at most require an ETC to provide one plan that would meet such a requirement but nothing would preclude an ETC from pricing that plan so that no customer would take it. The Commission will follow the FCC's guidance and evaluate local usage in the manner suggested by the FCC on a case by case basis taking into account the criteria recommended by Staff, set out in ¶ 7 of this Order.

Content, Frequency and Types of Media Advertising

9. 47 U.S.C. § 214(e)(1)(B) requires ETCs to advertise their services throughout the service area for which they have been designated "using media of general distribution." The FCC has provided no guidance on what constitutes compliance with this requirement.

10. In recent ETC designation dockets, the Commission has required that ETCs, such as RCC, ALLTEL, H&B Cable Service, Inc. (H&B Cable) and Nex-Tech Wireless, LLC (Nex-Tech Wireless) work with Staff on developing language to be used in all advertising in all areas for which the carriers are designated ETCs. These ETCs also have been required to include information directing customers to the Commission's Office of Public Affairs and Consumer Protection for complaints regarding service issues. In this docket, the Commission requested Comments on the following issues:

- What should be the content of the required advertising?
- Should the advertisements make clear that the ETC has universal service obligations, including provision of service in response to a reasonable request?
- Should advertisements include information directing consumers to the Commission's Office of Public Affairs and Consumer Protection for complaints?
- Should the Commission require that advertisements be made at certain specified frequencies, if so what should those frequencies be?

- What types of media should be considered “media of general distribution?”
- Should ETCs certify compliance on an annual basis and if so, how?¹¹

11. In response to the Commission’s questions, ALLTEL, Sprint, SWBT, RCC and USCOC requested the Commission not impose any Kansas-specific advertising requirements.¹² In general they argued that their advertisement is national in scope and that it would be burdensome to tailor advertisements to state-specific requirements.¹³ SIA and ITG stated their opposition to imposing an advertising requirement on ILECs contending that ILECs are well known in their service areas and advertising requirements would provide no benefit to consumers.¹⁴ Staff stated competitive ETCs should be required to advertise their ETC responsibilities and how to contact the Commission’s Office of Public Affairs and Consumer Protection for complaints about service problems. All ETCs should be required to certify their advertising annually, including types of media used, geographic area reached by the advertisements and the dates on which they occurred.¹⁵ SWBT suggested carrier compliance be reviewed as part of the annual recertification process.¹⁶ RCC and USCOC suggested requirements may be unnecessary if ETCs are required to keep records of their advertising so that they can be audited. They also referenced an Alaska Commission order addressing ETC status for Alaska Digitel which established other requirements for informing customers and potential customers, one part of which was use of an annual bill stuffer. ALLTEL suggested an annual bill message to provide information.¹⁷ Staff’s Report recommended the

¹¹ Order Opening Docket, ¶ 7.

¹² ALLTEL Comments, ¶ 14, Sprint Reply Comments, p. 5, RCC and USCOC Comments, ¶ 23, SWBT Comments, ¶ 7.

¹³ Sprint Reply Comments, p. 5.

¹⁴ SIA and ITG Comments, ¶ 8.

¹⁵ Staff Reply Comments, ¶ 8.

¹⁶ SWBT Comments, ¶ 7.

¹⁷ RCC and USCOC Comments, ¶ 23, ALLTEL Reply Comments, ¶ 9.

Commission require all ETCs to comply with the advertising requirements imposed in the ALLTEL and RCC orders and include information regarding their obligation to provide universal service and contact information for complaining to the Office of Public Affairs and Consumer Protection. Finally, Staff recommended inclusion of media used for advertising, geographic areas reached by the advertisements and the dates published in the annual certification required for certification of use of universal service support. Staff stated such certification could be incorporated into the existing certification form adopted in Docket No. 05-GIMT-112-GIT or provided separately.¹⁸

12. The Commission finds it is important that customers are fully informed when choosing telecommunications providers. ETCs receive universal service support and are statutorily required to advertise their service throughout their service areas. It makes little sense to impose an advertising requirement if the information provided in the advertisement is not meaningful. The Commission agrees with Staff that competitive ETCs should be required to include language regarding their universal service obligation in all their advertisements in their Kansas ETC areas. Competitive ETCs should develop meaningful language so that consumers will understand what they can expect from an ETC and provide it to Staff for review so that such language can be included in their advertisements within 90 days from the date of this Order. If such information were included in a bill message, as recommended by ALLTEL, it would only reach the ETC's current customers. Inclusion in a bill message will not serve to let consumers know of competitive alternatives in their service areas, and thus not encourage competition in the manner expected by both the Federal and State Telecommunications Acts. Although companies argue that such a requirement is burdensome because their advertising is

¹⁸ Report, p. 8.

national in character, the Commission notes that several companies are already including this information in their advertisements as a result of their ETC designation orders. An additional advertising requirement is addressed in ¶ 33.

13. The Commission further finds that all competitive ETCs shall include the contact information for the Office of Public Affairs and Consumer Protection in their advertisements to make sure that customers know where to turn with questions and complaints.¹⁹ Finally, the Commission requires Staff to revise the annual ETC certification form, adopted in Docket No. 05-GIMT-112-GIT, to include certification of media in which advertisements have been placed, geographic areas reached and dates published.

Per Minute Blocking for Usage-based Billing

14. ETCs are required to offer either toll control or toll blocking service to Lifeline customers at no charge. Based on testimony for ITG in the ALLTEL proceeding the Commission sought comment on whether an ETC should be required to offer per-minute blocking for Lifeline customers.²⁰

15. ALLTEL stated it could provide per-minute blocking but did not believe such a service was necessary. SIA and ITG expressed concern that per-minute blocking would interfere with the customer's ability to make local calls, contrary to the goal of universal service. They recommended the Commission explore a technological solution that would allow customers of wireless competitive ETCs to block excessive, unaffordable calling beyond the local community.²¹ Staff observed this recommendation

¹⁹Since incumbent ETCs are required to include such information in their telephone directories their customers have ready access to this information.

²⁰ Order Opening Docket, ¶ 8.

²¹ SIA and ITG Comments, ¶ 9.